SUPREME COURT OF ARKANSAS

IN RE: ARKANSAS RULES OF CIVIL PROCEDURE 4 AND 26; ADMINISTRATIVE ORDER NUMBER 20; AND RULE OF EVIDENCE 502

Opinion Delivered January 10, 2008

PER CURIAM

On May 25, 2007, we published for comment the Arkansas Supreme Court Committee on Civil Practice's proposals for changes in the Arkansas Rules of Civil Procedure, Administrative Orders, Rules of Evidence, Rules of Appellate Procedure - Civil, and Rules of The Supreme Court and Court of Appeals. *See In Re Arkansas Rules of Civil Procedure; Administrative Order; Rules of Evidence; and Rules of the Supreme Court and Court of Appeals*, 370 Ark. Appx. (2007). We thank everyone who reviewed the proposals.

With two exceptions, of the Committee's recommendations that we published, we accept with minor changes the Committee's recommendations.

Based on our review of the comments submitted by the bench and bar, as well as numerous surveys of federal and state court rules governing publication and citation of opinions, we decline, by a vote of 4 to 3, to approve the Committee's proposed change to Rule 5-2 of the Rules of the Supreme Court and Court of Appeals.[1]

[1] Chief Justice Hannah and Justices Brown and Imber would approve the Committee's proposed change to Rule 5-2.

We also note that the Committee recommended an amendment to Arkansas Rule of Evidence 502, and the Arkansas Bar Association petitioned the court to amend the same rule. We published the Bar Association's proposal separately. *See In Re Rules Governing Waiver of Attorney-Client Privilege and Work-Product Doctrine*, 270 Ark. Appx. (2007). We accept the Bar Association's proposed changes to Ark. R. Evid. 502. While both proposals are identical with respect to the inadvertent disclosure of material covered by the attorney-client privilege and the work-product doctrine, the Bar Association's proposal also provides that disclosure of information covered by the attorney-client privilege or the work-product doctrine to a government agency does not constitute a general waiver.

Finally, it should be noted that the Committee's recommended amendment to Ark. R. Civ. P. 26 (b)(5), which is hereby accepted, is not limited to the inadvertent disclosure of information covered by the attorney-client privilege or the work-product doctrine. Rule 26 (b)(5) applies to work-product as well as to "a claim of privilege," which, according to the Reporter's Note, means "any evidentiary privilege."

We adopt the following amendments and republish the Rules and Reporter's Notes as set out below. Except for Administrative Order Number 20, these amendments shall be effective immediately. **[Administrative Order Number 20 shall be effective March 1, 2008 for new appointments. For currently appointed process servers, they shall comply with the renewal appointment procedure in subsection 20(e) on or before December 31, 2008.]**

We encourage all judges and lawyers to review this *per curiam* order to familiarize

themselves with the changes to the rules. We again express our gratitude to the members of our Civil Practice Committee for the Committee's diligence in performing the important task of keeping our civil rules current, efficient, and fair.

A. ARKANSAS RULES OF CIVIL PROCEDURE

Rule 4. Summons.

. . . .

(c) *By Whom Served.* Service of summons shall be made by (1) a sheriff of the county where the service is to be made, or his or her deputy, unless the sheriff is a party to the action; (2) any person appointed pursuant to Administrative Order No. 20 for the purpose of serving summons by either the court in which the action is filed or a court in the county in which service is to be made; (3) any person authorized to serve process under the law of the place outside this state where service is made; or (4) in the event of service by mail or commercial delivery company pursuant to subdivision (d)(8) of this rule, by the plaintiff or an attorney of record for the plaintiff.

Addition to Reporter's Notes, 2007 Amendment: *New Administrative Order Number 20 prescribes minimum qualifications for private process servers appointed by the circuit courts, as well as the procedure for their appointment. The change in Rule 4(c) eliminates the one former qualification (being at least eighteen years old) and incorporates by reference the expanded qualifications contained in the new Administrative Order.*

Rule 26. General provisions governing discovery.

. . . .

(b) *Scope of Discovery.* Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

. . . .

(4) *Trial preparation: experts.* Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A) (i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which he is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Subject to subdivision (b)(4)(C) of this rule, a party may depose any person who has been identified as an expert expected to testify at trial

. . . .

(5) *Inadvertent Disclosure*. (A) A party who discloses or produces material or information without intending to waive a claim of privilege or attorney work product shall be presumed not to have waived under these rules and the Arkansas Rules of Evidence if the party takes the following steps: (i) within fourteen calendar days of discovering the inadvertent disclosure, the producing party must notify the receiving party by specifically identifying the material or information and asserting the privilege or doctrine protecting it; and (ii) if responses to written discovery are involved, then the producing party must amend them as part of this notice.

(B) Within fourteen calendar days of receiving notice of an inadvertent disclosure, a receiving party must return, sequester, or destroy the specified materials and all copies. After receiving this notice, the receiving party may not use or disclose the materials in any way.

(C) A receiving party may challenge a disclosing party's claim of privilege or protection and inadvertent disclosure. The reason for such a challenge may include, but is not limited to, the timeliness of the notice of inadvertent disclosure or whether all the surrounding circumstances show waiver.

(D) In deciding whether the privilege or protection has been waived, the circuit court shall consider all the material circumstances, including: (i) the reasonableness of the precautions taken to prevent inadvertent disclosure; (ii) the scope of the discovery; (iii) the extent of disclosure; and (iv) the interests of justice. Notwithstanding Model Rule of Professional Conduct 3.7, and without having to terminate representation in the matter, an attorney for the disclosing party may testify about the circumstances of disclosure and the procedures in place to protect against inadvertent disclosure.

Addition to Reporter's Notes, 2007 Amendment: *Paragraph (4)(A) of subdivision (b) has been amended to conform the Rule to current practice. Parties routinely depose testifying experts, as they do other witnesses, without first getting a court order allowing the deposition. This amendment eliminates an unnecessary provision that no one was following.*

Paragraph (5) has been added to subdivision (b). These provisions protect parties who inadvertently disclose material protected by any evidentiary privilege or doctrine of protection, such as the attorney work product doctrine. This provision draws on the work of the Arkansas Bar Association's Task Force on the Attorney-Client Privilege, American Bar Association Resolution 120D (adopted by House of Delegates in August 2006), and a 2006 amendment to Federal Rule of Civil Procedure 26. The Arkansas Bar Association specifically endorsed a similar change in the Arkansas Rule, although its proposal was limited to the attorney-client privilege and the work-product doctrine.

Lawyers do their best to avoid mistakes, but they sometimes happen. Discovery has always posed the risk of the inadvertent production of privileged or protected material. The advent of electronic discovery has only increased the risk of inadvertent disclosures. This amendment addresses this risk by creating a procedure to evaluate and address inadvertent disclosures, including disputed ones.

Arkansas law on this issue is scarce. In Firestone Tire & Rubber Co. v. Little, 276 Ark. 511, 639 S.W.2d 726 (1982), a letter between two lawyers for Firestone "made its way" to one of Firestone's customers, who produced the letter in another lawsuit. The Supreme Court held that Firestone waived the privilege by allowing the letter to get into the customer's hands. 276 Ark. at 519, 639 S.W.2d at 730. The Court, however, did not discuss how the customer obtained the letter or whether Firestone's disclosure was inadvertent. The Eighth Circuit has endorsed the multi-factor approach contained in this Rule as amended. Gray v. Bicknell, 86 F.3d 1472, 1483–84 (8th Cir. 1996) (predicting in a diversity case that Missouri courts would adopt this approach, which is the majority view).

The new provision creates a presumption against waiver if the disclosing party acts promptly after discovering the inadvertent disclosure. Notice by the disclosing party must be specific about both the material inadvertently disclosed and the privilege or doctrine protecting it. After receiving this kind of notice, a party may neither use nor disclose the specified material. Instead, the receiving party must either return, sequester, or destroy the material (including all copies). A party's failure to fulfill these obligations will expose that party to sanctions under Rule 37. The new provision also creates a procedure for the receiving party to challenge a notice of inadvertent disclosure and a procedure for the circuit court to resolve the dispute. This procedure, which requires the court to consider all the material circumstances, "strikes the appropriate balance" and is "best suited to achieving a fair result." Gray, 86 F.2d at 1484.

B. ADMINISTRATIVE ORDERS

ADMINISTRATIVE ORDER NUMBER 20

Private Civil Process Servers
Appointment—Qualifications

(a) *Authority to Appoint Persons to Serve Process in Civil Cases*. The administrative judge of a judicial district, or any circuit judge(s) designated by the administrative judge, may issue an order appointing an individual to make service of process pursuant to Arkansas Rule of Civil Procedure 4 (c)(2) in each county of the district wherein approval has been granted. The appointment shall be effective for every division of circuit court in the county.

(b) *Minimum Qualifications to Serve Process*. Each person appointed to serve process must have these minimum qualifications:

(1) be not less than eighteen years old and a citizen of the United States;
(2) have a high school diploma or equivalent;
(3) not have been convicted of a crime punishable by imprisonment for more than one year or a crime involving dishonesty or false statement, regardless of the punishment;
(4) hold a valid Arkansas driver's license; and
(5) demonstrate familiarity with the various documents to be served.

Each judicial district may, with the concurrence of all the circuit judges in that district, prescribe additional qualifications.

(c) *Appointment Procedure*.

(1) A person seeking court appointment to serve process shall file an application with the circuit clerk. The application shall be accompanied by an affidavit stating the applicant's name, address, occupation, and employer, and establishing the applicant's minimum qualifications pursuant to section (b) of this Administrative Order.

(2) The judge shall determine from the application and affidavit, and from whatever other inquiry is needed, whether the applicant meets the minimum qualifications prescribed by this Administrative Order and any additional qualifications prescribed in that district. If the judge determines that the applicant is qualified, then the judge shall issue an order of appointment. The circuit clerk shall file the order, and provide a certified copy of it to the process server and to the sheriff of the county in which the person will serve process. The circuit clerk of each county shall maintain and post a list of appointed civil process servers.

(d) *Identification*. Each process server shall carry a certified copy of his or her order of appointment, and a Arkansas driver's license, when serving process. He or she shall, upon request or inquiry, present this identification at the time service is made.

(e) *Duration, Renewal, and Revocation***.**

A judge shall appoint process servers for a fixed term not to exceed three years. Appointments shall be renewable for additional three-year terms. A process server seeking a renewal appointment shall file an application for renewal and supporting affidavit demonstrating that he or she meets the minimum qualifications prescribed by this Administrative Order and the judicial district. Upon notice to the administrative judge, any circuit judge may revoke an appointment to serve process for his or her division for any of the following reasons: (1) making a false return of service; (2) serious and purposeful improper service of process; (3) failing to meet the minimum qualifications for serving process; (4) misrepresentation of authority, position, or duty; or (5) other good cause.

(f) *Forms*. Forms for the application, affidavit, order of appointment, and renewal of appointment are available at the Administrative Office of the Courts section of the Arkansas Judiciary website, http://courts.state.ar.us .

Explanatory Note*: This new Administrative Order imposes expanded minimum qualifications for private process servers in civil cases. Arkansas Rule of Civil Procedure 4(c)(2) formerly provided that the circuit court could appoint any person more than eighteen years old to serve process. Given the importance and effect of service of process, that qualification is insufficient. The expanded minimum qualifications imposed by this Administrative Order will help ensure the competence and character of private process servers. The Order establishes a floor, not a ceiling: the circuit judges in each judicial district may establish additional qualifications. Rule 4(c)(2) has been amended to incorporate this Order by reference. The Order also creates a uniform procedure for appointment and reappointment by the circuit court, as well as giving examples of the good cause which would justify revocation of the privilege of serving process. Finally, the Order requires process servers to carry a certified copy of their order of appointment, and their driver's license, to establish the server's legal authority.*

C. ARKANSAS RULES OF EVIDENCE

Rule 502. Lawyer-client privilege.

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(e) *Inadvertent disclosure*. A disclosure of a communication or information covered by the attorney-client privilege or the work-product doctrine does not operate as a waiver if the disclosing party follows the procedure specified in Rule 26(b)(5) of the Arkansas Rules of Civil Procedure and, in the event of a challenge by a receiving party, the circuit court finds in accordance with Rule 26(b)(5)(D) that there was no waiver.

(f) *Selective waiver.* Disclosure of a communication or information covered by the attorney-client privilege or the work-product doctrine to a governmental office or agency in the exercise of its regulatory, investigative, or enforcement authority does not operate as a waiver of the privilege or protection in favor of non-governmental persons or entities.

***Explanatory Note**: New subdivision (e) cross-references the 2007 amendment to Rule of Civil Procedure 26(b), which governs inadvertent disclosures of privileged or otherwise protected material during discovery.*

Under new subdivision (f), disclosure of information covered by the attorney-client privilege or the work-product doctrine to a government agency conducting an investigation of the client does not constitute a general waiver of the information disclosed. In short, this provision adopts a rule of "selective waiver" consistent with the Eighth Circuit's view that disclosure of protected information to the government does not constitute a general waiver, so that the information remains shielded from use by other parties. E.g., Diversified Industries, Inc. v. Meredith, 572 F. 2d 596 (8th Cir. 1977).

This is the minority view among the federal circuits. Most have held that waiver of privileged or protected information to a government agency constitutes a waiver for all purposes. E.g., In re Quest Communications Intern, Inc., 450 F. 3d 1179 (10th Cir. 2006). Others have recognized selective waiver only if the disclosure was made subject to a confidentiality agreement with the government agency. E.g., Teachers Insurance & Annuity Ass'n v. Shamrock Broadcasting Co., 521 F. Supp 638 (S.D.N.Y. 1981).

Subdivision (f) adopts the Eighth Circuit's position, which is also reflected in a draft that the Federal Advisory Committee on Evidence has published for public comment. See http://www.uscourts.gov/rules/Excerpt_EV_Report_Pub.pdf#page=4.